ber 21, the court lifted the TRO and denied DFG's motion for a preliminary injunction, on grounds that the term "take" as used in CESA is restricted to the context of hunting and fishing, and does not apply to pumping operations.

On behalf of DFG, the Attorney General's Office immediately appealed the decision to the Third District Court of Appeal, arguing that the superior court has approved the illegal take of an endangered species and that its order is frustrating massive state and federal endeavors to restore the species. The AG argues that the lower court's decision "has completely emasculated the California Endangered Species Act by a strained construction of the term 'take.' The Court is in complete error." At this writing, the case is pending in the Third District; ACID resumed pumping operations the day the TRO was lifted.

Natural Resources Defense Council v. California Fish and Game Commission, No. 368042, is scheduled for hearing on May 8. On September 13, NRDC filed a petition for writ of mandate seeking to overturn FGC's refusal to list the California gnatcatcher as an endangered species, on the basis that the agency decision was arbitrary and capricious and an abuse of discretion. (*See supra* NATURAL RESOURCES DEFENSE COUNCIL; *see also* CRLR Vol. 11, No. 4 (Fall 1991) pp. 37 and 181 for background information.) The Building Industry Association of Southern California, the Transportation Corridor Agency of Orange County, and another Orange County toll road agency moved to intervene in the suit in defense of FGC's decision, while several conservation groups (including the Humane Society, Mamomet Bird Observatory, Sierra Club, California Native Plant Society, and the Mountain Lion Foundation) have submitted *amicus curiae* briefs in support of NRDC. On November 20, a Sacramento County Superior Court judge approved the intervention, which gives the three powerful organizations the right to appeal and to participate in any settlement negotiations that might take place.

Vietnamese Fisherman Association of America, et al., v. California Department of Fish and Game, et al., No. C910778-DLJ, is still pending in U.S. District Court for the Northern District of California. A status conference is scheduled for March 18, during which an attempt will be made to resolve the inconsistencies between the Proposition 132's gill-netting ban and the regulations of the federal Pacific Fishery Management Council, which allow gill-netting. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 171 and Vol. 11, No. 2 (Spring 1991) p. 158 for background information.)

RECENT MEETINGS:

At its August 29–30 meeting, DFG introduced its recommended 1992–93 ocean sport fishing regulations to FGC. The proposed major changes from last year's regulations include: permitting sport fishers to use unlimited size dip nets for bait collection instead of the current six-foot diameter maximum; allowing up to three daily bag limits of saltwater fish in possession on a multi-day fishing trip if a declaration is previously filed with DFG; and eliminating the facsimile mode of filing the declaration for multi-day fishing trips. Under current regulations, sharks and rays are exempt from the general sport fishing daily bag limit (ten fish of any one species), but DFG is proposing a daily bag limit of five and a minimum size of 36 inches on leopard sharks and a daily bag limit of two on shortfin mako sharks, thresher sharks, and blue sharks. DFG also proposes to open the Dungeness crab and spiny lobster season to sport fishers one week prior to the commercial season, to create a more equitable allocation of crabs and lobsters between sport and commercial fishers.

FGC held discussion hearings on the proposed ocean sport fishing regulations at its meetings on October 4 in Redding, November 1 in San Diego, and December 5 in Sacramento; FGC was scheduled to adopt the proposed rules at its January 9–10 meeting in Palm Springs.

FUTURE MEETINGS:

April 2–3 in Long Beach.
May 14–15 in Bakersfield.

BOARD OF FORESTRY

Executive Officer: Dean Cromwell
(916) 653-8007

The Board of Forestry is a nine-member Board appointed to administer the Z'berg-Nejedly Forest Practice Act (FPA) of 1973 (Public Resources Code section 4511 *et seq.*). The Board is established in Public Resources Code (PRC) section 730 *et seq.*; its regulations are codified in Division 1.5, Title 14 of the California Code of Regulations (CCR). The Board serves to protect California's timber resources and to promote responsible timber harvesting. Also, the Board writes forest practice rules and provides the Department of Forestry and Fire Protection (CDF) with policymaking guidance. Additionally, the Board oversees the administration of California's forest system and wildland fire protection system, sets minimum statewide fire safe standards, and reviews safety elements of county general plans. The Board's current members are:

Public: Terry Barlin Gorton (Chair), Franklin L. "Woody" Barnes (Vice-Chair), Robert J. Kerstiens, Elizabeth Penaat, and James W. Culver.

Forest Products Industry: Mike A. Anderson, Joseph Russ IV, and Thomas C. Nelson.

Range Livestock Industry: Jack Shannon.

The FPA requires careful planning of every timber harvesting operation by a registered professional forester (RPF). Before logging operations begin, each logging company must retain an RPF to prepare a timber harvesting plan (THP). Each THP must describe the land upon which work is proposed, silvicultural methods to be applied, erosion controls to be used, and other environmental protections required by the Forest Practice Rules. All THPs must be inspected by a forester on the staff of the Department of Forestry and, where deemed necessary, by experts from the Department of Fish and Game, the regional water quality control boards, other state agencies, and/or local governments as appropriate.

For the purpose of promulgating Forest Practice Rules, the state is divided into three geographic districts—southern, northern, and coastal. In each of these districts, a District Technical Advisory Committee (DTAC) is appointed. The various DTACs consult with the Board in the establishment and revision of district forest practice rules. Each DTAC is in turn required to consult with and evaluate the recommendations of the Department of Forestry, federal, state, and local agencies, educational institutions, public interest organizations, and private individuals. DTAC members are appointed by the Board and receive no compensation for their service.

MAJOR PROJECTS:

Board Admits Failure. Beset by criticism from all sides and under orders from the Governor, on October 16 the Board of Forestry approved emergency regulations designed to rationalize and reform the THP approval process. The Office of Administrative Law (OAL) approved the emergency regulations on November 25. The sudden burst of emergency regulations followed a directive to the Board from Governor Wilson in his veto of AB 860 (Sher), the so-called "Sierra Accord." (See CRLR Vol. 11,

No. 4 (Fall 1991) pp. 188 and 190–91 and Vol. 11, No. 3 (Summer 1991) p. 175 for background information.) Required to justify the promulgation of emergency rules to OAL, the Board submitted a shocking document which admitted that its "slowness to adapt the regulatory system to the changing forest conditions and to incorporate a broader set of goals for forest regulation has led to a crisis situation." The statement cautioned, "This does not mean that the Board in the past was wrong, or that the current Board members are bound by the views of the past Board members, or, indeed, their own earlier views."

The Board now maintains that present harvesting practices threaten to degrade and deplete forest resources, particularly the "unique ecological characteristics" of ancient and old- growth forests. The Board has accepted the Department of Fish and Game's position that "many species" such as the marbled murrelet "exist at threshold levels" and that "other old-growth-dependent species share similar risks from continued fragmentation and intensive management of late seral stage [forests]." Specifically, the Board cited statistics showing that old-growth redwood forest had been reduced to 10.6% of its natural range by 1988, that a large part of these remaining stands are on public lands, and that the private stands have certainly declined further since the report was made.

Another study cited by the Board found that only 5,000 acres of ancient (never logged) redwood forest remain on private land. Only 0.7% of California's private timberland consists of even-age stands 200 years or older. The Board acknowledged that this crisis is the result of overlogging, pointing out that between 1978 and 1985 average annual harvests on the state's industrial timberlands exceeded growth by 22%. In Mendocino County, harvest exceeded growth by 225%. California's total privately-owned timber resources declined 44% between 1953 and 1975. The average timber inventory per acre on industrial timberlands is approximately 65% lower than on a typical state forest and an estimated 86% lower than it would be on land managed under the emergency regulations. The Board predicts that if current trends continue, inventories on industrial timberlands will decline at least another 36% by 2015.

An independent University of California study released in November confirmed the Board's dire warnings. The study found that in the heavily forested slopes of the Sierra Nevada east of Sacramento, damage to soil and vegetation is impairing the mountain range's ability to store and regulate water. As a result of the Board's timber harvest regulations, according to the UC study, streams and tributaries carry more water than normal in the winter and less in summer and are filled with silt and debris that cause them to become broader and shallower. The UC study concluded that dramatic action is necessary to repair damage that will nevertheless "continue to have impacts for millennia."

The proposal and approval of comprehensive emergency rules resulted in an atmosphere of near chaos in the affected timber companies and communities. By late December, three similar packages were vying for position: the emergency regulations approved on November 25, which are effective for 120 days; draft permanent regulations designed to take their place; and the "Sustainable Forestry Reform Act of 1992" (SFRA), a proposed legislative codification of the "Grand Accord" negotiated by the Governor and some environmental and timber interests after Wilson's veto of the Sierra Accord. (*See supra* reports on PLANNING AND CONSERVATION LEAGUE and SIERRA CLUB for background information.) SFRA was scheduled for presented to the legislature in January. Differences in language and substance among the three sets of documents and the multitude of pending lawsuits challenging THP approvals served to heighten the general confusion at the Board's December 10–11 meeting. Only three THPs were filed between OAL's approval of the emergency regulations and the meeting date, a significant reduction from an average weekly submission rate of 24 THPs. On the other hand, when the emergency regulations were temporarily withdrawn before OAL approval, the submission rate rose to 56 THPs. The following is a summary of the emergency rule package and a comparison with a draft of the proposed SFRA dated December 9. Both are contrasted to continuing environmental group objections as reflected in another proposed rule package submitted to the Board by the Redwood Coast Watershed Alliance (RCWA). The permanent rules have not solidified at this writing and will not be considered.

-THP Sufficiency Under the Forest Practice Act. Reflecting concern whether THPs conform to the intent of the FPA, the Board promulgated amendments to sections 895.1, 897, and 898.1, Title 14 of the CCR. These new rules include goals pertaining to ancient and old-growth forests, and definitions of the terms "planning watershed" and "functional wildlife habitat." The Board hopes these goals and definitions will shift the THP evaluation horizon above and beyond the boundaries of an individual THP toward consideration of a larger total "landscape" approach, which includes sustainable yield, wildlife habitat, late seral stage and ancient forests, soil stability, water quality, and beneficial use of water. Also included in these changes is a codification of the holding in *Sierra Club v. Board of Forestry*, which allows the CDF Director to request information needed to clarify a THP, the forest resource area affected, and the nature and purpose of the proposed operations. (*See infra* LITIGATION; *see also* CRLR Vol. 11, No. 4 (Fall 1991) pp. 191–92 for background information.) In addition, the CDF Director may request information to evaluate the economic impact of a THP decision, including potential job loss, negative economic impacts on the community, business closings, and other factors as appropriate.

-Silvicultural Methods with a Sustained Yield Objective. In response to public concern about the depletion of forest resources, the Board's emergency regulations include new sections 913.1.5, 933.1.5, 953.1.5, 913.2.5, 933.2.5, and 953.2.5, and amendments to sections 895.1, 913.1, 933.1, and 953.1, Title 14 of the CCR. These changes address the concern that the extant regulations did not adequately meet the requirements of PRC section 4513, which states the legislature's intent that the Board's THP program achieve "maximum sustained production of high-quality timber products . . . while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment."

The emergency rules describe appropriate silvicultural methods and permissible alternatives, while requiring that the method chosen achieve compliance with PRC section 4513. These silvicultural standards were requested by CDF as early as February 1991, but the Board declined to adopt them. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 172–73 for background information.) For the first time, the rules define the term "maximum sustained production of high-quality timber products." The definition reflects the objective that landowners make "regular progress toward achieving the wood production potential of the ownership" by harvesting trees when they are near biological maturity.

The principle the Board hopes to implement is essentially that "industrial" trees tend to reach their maximum rate of growth as they approach biological maturity at 80–100 years of age. After that time, a tree's growth rate tends to decline. In terms of rational long-term timber production, it makes sense to maximize the rate of timber growth—so that it not be exceeded by the harvest rate—and this is accomplished by refraining from harvesting rapidly growing trees that have not reached biological maturity. The Board noted that more than half of all privately- owned timberlands in California contain mixed-age stands where the majority are young-growth. The Board also observed increased THP filings for young-growth harvesting. The cause, according to the Board, is changes in manufacturing technologies (*e.g.*, more use of fiberboard) that "have allowed for the merchantability of younger trees and earlier economic realization for timberland owners." Not only is this detrimental to the rational growth of wood products for sale, it also destroys quality wildlife habitat that tends to exist only in forests with mature trees.

Governor Wilson's SFRA contains essentially the same definition of sustainability as the emergency regulations. However, it leaves open the question of how management of timberland is to proceed from the current low point toward sustainability. The emergency regulations include a requirement of "regular progress" toward timber maturity in each ownership. The RCWA proposal would require that timber "inventories on all ownerships increase by at least 10% per decade until maximum sustainable productivity has been achieved." Also, in stark contrast to the other alternatives, RCWA would explicitly limit maximum sustainable production to the quantity of timber that can be produced "without compromising the health of the forest ecosystem." The Sierra Club has objected to the vagueness of the sustainability definition in SFRA.

The silvicultural rules also address clearcutting practices. Prior to the emergency regulations, the maximum area allowed to be clearcut was 120 acres. The emergency regulations define clearcutting as the removal of greater than 70% of all trees in one operation, and limit the maximum clearcut area to no more than 40 acres. Re-entry to clearcut is prohibited for 50–80 years. SFRA's requirements would reduce the maximum clearcut area to 30 acres. RCWA recommends a 10-acre maximum on south and west slopes and 20 acres on north and east slopes, and would limit timber cutting (of any type) to 5% per year and 20% over a ten-year period for each ownership.

In a hearing on November 20, several timberland owners expressed concern that the new regulations will create a perverse incentive for owners who currently select cut to instead clearcut for administrative ease. The attorney for one timberland owner threatened the Board with a lawsuit alleging an unconstitutional taking of private land for public good without compensation. Several who testified commented on the need for clarification of the regulations.

-Wildlife and Ancient Forest Protection. In order to provide "a workable and integrated framework for making the complex resource management decisions necessary to achieve the optimum and appropriate balance among [competing] interests in the diverse kinds of forests in this State," the Board amended section 895.1 and adopted new sections 919.15, 939.15, 959.15, 919.16, 939.16, 959.16, 919.17, 939.17, 959.17, 919.18, 939.18, and 959.18, Title 14 of the CCR. These emergency rules contain provisions for the protection of wildlife, minimum requirements for late seral stage forests, and protection of ancient and old-growth forest.

New sections 919.15, 939.15, and 959.15 require a THP to identify potentially significant impacts on wildlife species from proposed timber harvesting and, if necessary, propose mitigation measures to "avoid or reduce to relative insignificance significant impacts on those species when compared to future conditions for wildlife habitat." The CDF Director may require later evaluations of the effectiveness of the mitigation during or after harvest.

New sections 919.16, 939.16, and 959.16 set forth the minimum requirement that at least 15% of the area within an ownership be devoted to meeting late seral stage conditions. Late seral stages represent timber with special wildlife habitat features such as snags, live "unmerchantable" trees, down trees, nest trees, and coarse woody debris. The rules recommend that timberland owners choose watercourse and lake protection zones and other areas as necessary to provide "functional connectivity for wildlife between habitats." Protection of late seral stages also helps retain multi-layered canopies needed for wildlife habitat. RCWA's proposed rules concur in the 15% minimum but omit provisions included in both the emergency rules and SFRA permitting harvesting within the minimum area under certain conditions. The Sierra Club, in particular, has expressed concern that by omitting DFG's definition of wildlife (to include "the habitat upon which the wildlife depends for continued viability . . .," from section 711.2 of the Fish and Game Code) from SFRA, the Board will be allowed to create its own definition and weaken DFG's ability to protect wildlife. The Sierra Club generally believes SFRA erodes DFG's authority by placing real authority for wildlife protection in hands of the Board of Forestry, with only token participation by DFG.

The emergency regulations define an ancient forest as one which has never been logged, which has a probable age of 200 years, and which occupies at least 40 contiguous acres. Under the emergency rules, 50% of these trees may be harvested once every 25 years so long as a multi-story canopy remains, along with at least six large trees per acre and one-half of the down logs, unmerchantable trees, and standing dead trees necessary for wildlife habitat. The regulations even permit exceptions to these requirements "where the RPF demonstrates in a clear and convincing manner that proposed timber harvesting operations will not result in a reduction of ancient forest habitat values and the Department of Fish and Game concurs. . . ." The Board indicated in its response to public comments that this section does not give DFG veto power over the exception; the final decision rests with the CDF Director.

SFRA diverges from the emergency regulations by lowering the ancient forest age requirement to 175 years—which presumably would qualify more acres for protection—and permitting, in addition to the 50%/25-year interval, the choice of harvesting 20% of the trees in 10-year intervals or 30% in 15-year intervals. The open-ended exception contained in the emergency rules is omitted from SFRA. RCWA's proposed rules define ancient forests more broadly to include any contiguous parcel of 20 or more acres that has a sufficient old-growth overstory with dead, standing, or fallen trees and supporting or capable of supporting at least one old-growth-dependent wildlife species whose population has declined statewide as a result of logging. RCWA would explicitly permit only uneven-age harvesting that retains the specific characteristics of ancient forest and leaves at least 80% of the overstory undamaged. No re-entry would be permitted for 40 years.

-Sensitive Watersheds. In an attempt to address concerns about the effects of harvesting large portions of watersheds in a relatively short period of time, the

Board amended section 895.1 and adopted new sections 916.8, 936.8, 956.8, 916.9, 936.9, 956.9, and 1032.10, Title 14 of the CCR. The emergency regulations provide specific guidelines to be used in evaluating a THP which may affect a "sensitive watershed" or domestic water supplies. These include findings of actually or potentially significant soil disturbance over more than 20% of a watershed or harvesting in excess of 27% of the timber in a watershed area. SFRA would leave this matter to be determined by the Board at a future public hearing. The emergency rules require that once 15% of a sensitive watershed has been clearcut within a ten-year period, a THP must demonstrate that an additional clearcut will not degrade the water or wildlife habitat. Where the CDF Director finds that such degrading will occur, he/she "shall" prohibit further clearcutting. SFRA gives the Director discretion to prohibit clearcutting in sensitive watersheds even when less than 15% has been harvested and apparently prohibits any clearcutting in excess of 15% per decade. SFRA also limits total timber removal to 27% per decade within a "planning watershed" unless the Board approves a higher percentage by six affirmative votes and subject to rules to be promulgated by the Board. RCWA's rules would prohibit more than 27% of a planning watershed to be harvested over ten years by any method.

-Board Composition, Regional Committees, Long-Term Planning, and Penalties. SFRA would alter the composition of the Board to reduce the number of forest products industry members from three to two, eliminate the range livestock industry representative, and add two members who have been officers of nonprofit conservation organizations. The proposed act would also establish nine-member "regional forest sustainability committees" to, among other duties, develop draft regional strategies for long-term sustainability of the forest ecosystem within the region and to act as an agent of the Board to acquire land, easements, and harvesting rights to facilitate offsite mitigation and compliance with the requirements of the act.

The Board's emergency rules, SFRA, and RCWA's proposed rules would all require long-term timber, wildlife, and watershed planning by industrial owners. Only RCWA would apply this requirement to ownerships as small as 2,500–5,000 acres. The Sierra Club notes that the 1% surcharge on the harvest value of timber SFRA would establish to fund compliance enforcement is less than the 1.7% provided in the Sierra Accord, and argues that it is insufficient to ensure compliance by loggers with approved THPs. The Sierra Club similarly notes that the penalties for violation provided by SFRA are weaker than existing law, and that current criminal penalties would be reduced to infractions under the proposed act.

At this writing, the emergency rules are effective until approximately March 25; the Board has announced its intent to adopt permanent rules to replace the emergency rules, and has scheduled preliminary public hearings on draft rules for its January 8 meeting; and the legislature is preparing to debate the newly negotiated SFRA when it reconvenes.

In the meantime, environmental groups which oppose the SFRA may attempt to qualify a forest practices reform initiative for the November ballot. Although many environmental organizations have agreed to support (or at least not oppose) SFRA, the Sierra Club and Forests Forever—which sponsored the unsuccessful Proposition 130 in November 1990—oppose key provisions of the proposed legislation at this writing. In mid-December, Forests Forever announced that it would attempt to qualify a new "River, Oak and Wildlife Protection Act" for the November ballot. The Sierra Club has not endorsed the proposal to date, instead preferring to concentrate on securing positive amendments to SFRA while it is debated in the legislature during 1992.

Watercourse and Lake Protection Zones. After two years of studies and hearings, the Board adopted a package of regulations restricting timber harvesting within watercourse and lake protection zones (WLPZ) that received final OAL approval on September 23. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 190 and Vol. 11, No. 3 (Summer 1991) p. 174 for background information.) Only weeks later, the Board proposed emergency regulations to change the effective date of the WLPZ regulations. They were due to become effective on October 23, but the Board sought to delay the effective date until December 2 in order to educate the affected public on the new requirements, avoid confusion among foresters, timber owners and operators, and others affected by the regulations, avoid delays in the review of proposed THPs, provide extra time for amendment of existing THPs, and minimize premature enforcement and unnecessary litigation. However, OAL rejected the emergency postponement on October 23, finding that the Board failed to state sufficient cause for emergency regulations.

In response to OAL's rejection, the Board proposed new amendments to the WLPZ regulations; specifically, the Board seeks to amend sections 916.1, 936.1, 956.1, 916.3, 936.3, 956.3, 916.4, 936.4, 956.4, 916.5, 936.5, 956.5, 916.6, 936.6, and 956.6, Title 14 of the CCR. The new regulations would clarify several issues, including the need to consult with responsible and trustee agencies, appeals by those agencies, basic watercourse protections, a widening of the basic WLPZ, and variances to the WLPZ regulations.

At a public hearing on November 20, several people complained that the new regulations had been in effect for less than a month and that it is too soon to start amending them. Many questioned the wisdom of disregarding two years of research and solid scientific evidence before even testing the resulting rules. RPFs expressed concern that the amended WLPZ regulations would be too rigid, removing a degree of flexibility present in the current regulations that allows RPFs to make the rules work effectively. Timberland owners expressed concern about the larger zones created by the proposed amendments, and their extension of protection to class III watercourses. The few environmentalists and members of the public present at the hearing supported the proposed amendments on grounds that they would close loopholes in the existing rules. At its December meeting, the Board agreed to consider an exemption for owners of less than 5,000 acres. Staff was instructed to prepare appropriate language for consideration at the Board's January meeting.

Status Update on Other Proposed Regulatory Actions. The following is a status update on other Board of Forestry regulatory proposals discussed in recent issues of the *Reporter*:

-Emergency Protection for the Marbled Murrelet. On November 1, OAL approved for an additional 120-day period a modified version of the Board's emergency amendment of sections 895.1 and adoption of sections 919.13, 919.14, and 1036.1, Title 14 of the CCR. The new emergency rules, effective until March 1, designate the marbled murrelet as a "sensitive species" rather than a "species of special concern," and provide a definition of marbled murrelet habitat. Sections 919.13 and 919.14 set standards for a survey that must be conducted where a proposed THP includes marbled murrelet habitat, mandate consultation with DFG, and require "all feasible mitigations" to prevent a significant effect on the species. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 188 and Vol. 11, No. 3

(Summer 1991) pp. 171–72 for background information.)

In November, leading murrelet experts in the Pacific Northwest gathered in Davis to discuss findings from recent research and study about the habitat, behavior, and protection requirements of the murrelet. The experts concluded that, in California, marbled murrelets are dependent on old-growth redwood and Douglas fir trees with the Coastal District. They found that further specific delineation of murrelet habitat requirements is difficult to determine at this time. It is clear, however, that the greatest threat to the murrelet continues to be the loss of habitat resulting from timber operations.

-"Special Treatment Areas" Regulations. On November 27, OAL approved the Board's amendments to sections 895.1, 913.4(a), and 953.4(a), and new sections 929–929.6, 949–949.6, and 969–969.6, Title 14 of the CCR, which provide guidance to the CDF Director on the protection of archaeological and historical resources, including Native American cultural sites. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 189 and Vol. 11, No. 3 (Summer 1991) pp. 173–74 for background information.)

-Timberland Conversion Permit Fees. At its December meeting, the Board adopted new section 1104.3, Title 14 of the CCR, to establish a system of permit fees to finance the Board's Timberland Conversion Permit Program under PRC section 4621. Section 1104.3 would require an applicant for conversion of timberland to non- timber growing use to submit a $600 filing fee plus additional fees to cover the costs of employee services for complex conversions. The adoption of section 1104.3 was subject to additional language requiring that applicants be notified of estimated additional fees. At this writing, this proposed regulatory change has not been submitted to OAL. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 189 for background information.)

-Notice of Intent. Proposed amendments to regulatory subsections 1032.7(d) and (g), Division 1.5, Title 14 of the CCR, regarding the contents of the Notice of Intent to Harvest Timber which must be submitted to the CDF Director by the RPF who has prepared a THP, were adopted at the Board's December meeting after an additional 15-day comment period in November. The Board hopes to submit this change to OAL by February 1. (See CRLR Vol. 11, No. 4 (Fall 1991) pp. 188–89 for background information.)

-Sensitive Species Petition Mechanism. At its September meeting, the Board adopted rules establishing a sensitive species mechanism whereby concerned members of the public may petition the Board to classify a particular plant or animal species as "sensitive" for purposes of protecting it from timber harvesting. At this writing, new sections 919.12, 939.12, and 959.12, Title 14 of the CCR, have not been submitted to OAL for review. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 189 and Vol. 11, No. 3 (Summer 1991) p. 172 for background information.)

-The Board's September 1991 adoption of proposed amendments to section 1037.8, which require the CDF Director's written response to comments made during the THP approval process to be completed and released to the public when the THP is approved (instead of within ten days of the approval of the THP), have not been submitted to OAL for review at this writing. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 189 for background information.)

LEGISLATION:

SB 854 (Keene), AB 641 (Hauser), AB 714 (Sher), and ***SB 300 (McCorquodale)*** is a package of bills, each joined to the other and none of which will become law unless all do. The language of the bills was negotiated and resulted in the so-called "Sierra Accord," an agreement between environmental groups and Sierra Pacific Industries, the state's largest timberland owner. Many of their more important provisions were amended into AB 860 (Sher) in a conference committee session on September 10; however, Governor Wilson vetoed AB 860 on October 10. All four bills remain pending as two-year bills for consideration during 1992.

SB 854 (Keene), as amended September 5, would require long-term timber management plans for Type A timberland (any timberland owned or controlled by any person who owns or controls more than 20,000 acres of commercial timber, timberland, cutover land, or timber rights) or Type B timberland (timberland owned or controlled by any person who owns or controls more than 5,000 but less than 20,000 acres); prescribe maximum harvest limits as a percentage of timber volume on lands subject to a long-term timber management plan; and require the Board to adopt specified regulations by specified dates to implement the program, including requirements for long-term timber management plans. SB 854 is pending on the Assembly floor.

AB 641 (Hauser), as amended September 9, would establish wildlife habitat requirements for the long-term timber management plans proposed in SB 854 (Keene), including special requirements for ancient forests. The bill would also require the Board to adopt interim rules by January 1, 1993, and final rules by January 1, 1994, to provide standards and procedures for determination of maximum harvest limits for the timberlands of each ownership within planning watersheds. This two-year bill, which would also authorize landowners to petition the court and be granted an exemption from the provisions of the bill if the landowner can demonstrate specified matters, is pending in the Senate inactive file.

AB 714 (Sher), as amended September 9, would prohibit clearcuts and similar harvests in ancient forests. For other than ancient forests, this bill would prescribe special requirements for even-age regeneration harvest activities, including requirements for separation of successive regeneration harvest units by a buffer. This bill would also require the Board, by July 1, 1992, to adopt, with the concurrence of the Department of Fish and Game, regulations establishing standards and procedures for implementing these requirements. This two-year bill is pending in the Senate inactive file.

SB 300 (McCorquodale), as amended September 3, would protect streams and rivers in harvest areas by limiting harvesting; increase citizen input on THPs by lengthening to 60 days the THP review period on environmentally sensitive or controversial plans; and reformulate the composition of the Board of Forestry to better reflect the general public's interests in protecting forests. The new board would be made up of two forest products industry representatives, one range livestock industry representative or one nonindustrial timberland owner, three public representatives, four conservation group representatives, and one organized labor representative who is employed in the forest products industry. This two-year bill is pending on the Senate floor.

AB 1533 (Farr), as amended April 22, would revise the composition of the Board of Forestry to include one county supervisor, one member from a local chamber of commerce, and two members from conservation organizations; prescribe special conflict of interest requirements for the nonindustry and nonconservation organization members of the Board; require the Board to adopt, not later than April 1, 1993, regulations consistent with specified requirements and limitations to assure, among other things, that harvests

in old-growth virgin forests are conducted in a manner that addresses the distinctive values associated with those forests; and increase the maximum fine for violation of the FPA from $1,000 to $5,000. This two-year bill is pending in the Assembly Natural Resources Committee.

AB 1127 (Campbell), as amended May 7, would prohibit any person not registered as a professional forester from performing the duties of an RPF, or using the title of a registered professional forester. This two-year bill is pending in the Assembly Ways and Means Committee.

AB 445 (Sher), as amended April 18, would enact the California Releaf Act, requiring cities and counties to include specified tree planting and protection ordinances in their general plans by January 1, 1993. This two-year bill is pending in the Assembly Natural Resources Committee.

AB 512 (Sher), as amended April 9, would create the Timberland Conversion Account in the General Fund, and require specified fees to be deposited in the account. The funds would be available, upon appropriation, for purposes of administration of the timberland conversion provisions of CDF. This two-year bill is pending in the Senate inactive file.

AB 1407 (Lempert), as amended May 7, would require THPs within the Southern Forest District to be submitted for approval to the county in which the timber operation is to take place, in lieu of CDF. This two-year bill is pending in the Assembly Ways and Means Committee.

AB 959 (Areias), as amended May 8, would require CDF to establish a program for the provision of mobile communications vans, mobile command offices, and mobile kitchen trailers, and support staff for the maintenance and operation of that equipment. This two-year bill is pending in the Assembly Ways and Means Committee.

AB 1976 (Campbell) would require all timber operations to comply with specified minimum requirements, including a requirement that timber operations shall not be permitted that may degrade the waters of this state. This two-year bill is pending in the Assembly Natural Resources Committee.

SB 848 (Vuich) would require all owners of 75,000 acres or more of timberland to submit to CDF for approval, and to manage their lands pursuant to, a long-term resource management plan prepared by an RPF, unless the owner elects to be subject to specified alternative limitations. This two-year bill is pending in the Senate Committee on Natural Resources and Wildlife.

SB 888 (Keene), as amended August 19, would enact the Old-Growth and Native Forests Protection Act of 1992 which, if adopted, would authorize, for purposes of financing a specified old-growth forest protection program, the issuance of bonds in the amount of $300 million. This two-year bill is pending in the Assembly Committee on Banking, Finance, and Bonded Indebtedness.

SB 1072 (McCorquodale), as amended April 23, would require the Board to develop and coordinate a program of best management practices to protect water quality on rangelands, and to report to the legislature on or before December 1, 1992, and annually thereafter, on the progress of this program. This two-year bill is pending in the Senate Committee on Natural Resources and Wildlife.

AB 87 (Sher) would prohibit until July 1, 1992, timber operations within any stand of ancient redwood which, alone or in conjunction with any contiguous stand under public ownership, measures ten or more acres and which has never previously been subject to timber harvesting. This two-year bill is pending in the Assembly Natural Resources Committee.

LITIGATION:

In ***Albion River Watershed Protection Association v. California Department of Forestry and Fire Protection (Louisiana-Pacific Corporation, Real Party in Interest)***, No. A048704 (Oct. 18, 1991), the First District Court of Appeal applied the doctrine of exhaustion of administrative remedies to deny court jurisdiction over two out of three separate THPs for which plaintiffs sought review. In so doing, the court let stand CDF approval of two THPs (100 and 145) submitted by Louisiana-Pacific Corporation. The third (THP 114) was remanded to the trial court for further consideration of the exhaustion issue.

THP 100 proposed the clearcutting and shelterwood removal of approximately 145 acres of timber in the Slaughterhouse Gulch area of the Albion River Watershed. In response to this THP, CDF received comments from the public in the form of four identical preprinted letters opposing the plan. THP 114 proposed the harvesting of some 144 acres of timber in an area known as Escola Ranch, also through clearcutting and shelterwood removal. In response to this THP, CDF received three form letters, virtually identical to those commenting upon THP 100. In addition, CDF received a fourth letter, submitted by a private individual (Betty Ball) on behalf of an organization known as the Mendocino Environmental Center. This letter raised several significant environmental questions directed specifically to the plan. THP 145 proposed the clearcutting and shelterwood removal of 141 acres of timber in the Slaughterhouse Gulch and Deadman Gulch areas. CDF received eight letters from members of the public opposing the THP. Four brief handwritten notes contained only general comments or speculative concerns, and asked that the area be conserved as an underdeveloped sanctuary. Four other preprinted form letters, similar to those submitted regarding THPs 100 and 114, were also received. CDF approved all three THPs.

On May 1, 1989, the Albion River Watershed Protection Association (Albion) filed its initial petition for a writ of mandate. An amended petition containing two causes of action was filed on May 31, 1989. In the first cause of action, Albion alleged that CDF had improperly approved the THPs and that it had ignored the applicable statutes and regulations governing timber harvesting. In its second cause of action, Albion alleged that the Department of Fish and Game (DFG) had failed to conduct a thorough investigation of fish, wildlife, and plant life potentially impacted by the THPs in violation of its statutory duty. In its prayer for relief, Albion sought a writ ordering withdrawal of approval of the THPs and compliance with applicable statutes and regulations.

The trial court held that Albion lacked standing to pursue review of the CDF approvals because it had failed to exhaust its administrative remedies. Although Albion argued that it had not even been formed until after the THPs were approved (such that it could not possibly have participated in the administrative proceeding), it failed to allege this fact in its petition, and the court refused to allow Albion to correct this defect by amending its petition. The trial court also held that Albion could not proceed with its second cause of action against DFG because its petition failed to allege facts justifying equitable relief. Albion appealed, and the First District issued a writ of supersedeas enjoining timber operations on the three THPs, pending determination of the appeal.

In its decision, the First District pointed out the trial court's error in confusing the separate doctrines of standing and exhaustion of administrative remedies. Standing requirements are lib-

eral and were satisfied by Albion. The trial court also erred when it applied to the THP process the exhaustion of administrative remedies requirement set forth in PRC section 21177, which is part of the California Environmental Quality Act (CEQA). Section 21177 is inapplicable to CDF's THP process because CDF's process was certified under section 21080.5 as an alternative to CEQA's environmental impact report process.

Nevertheless, the court proceeded to apply the traditional exhaustion of administrative remedies doctrine to the facts of the case. Albion conceded it had not participated in the THP review process, but maintained it should be permitted to pursue its suit because it formed as an organization after the THPs were approved, and because persons who then joined the organization had participated in the THP review process. For this argument, Albion relied upon *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247 (1972), in which the California Supreme Court held that a class action by certain named plaintiffs who had not personally participated in the administrative process was not barred so long as the class was organized after the administrative review and it contained at least some persons who had participated. The First District held the trial court had abused its discretion in refusing to allow Albion the opportunity to amend its petition to come with the *Friends of Mammoth* exception.

Continuing the administrative exhaustion analysis, the court pointed out that Albion must also prove that "the exact issues it raises in its litigation against [CDF] were raised by that participant or some other person or entity in those administrative proceedings." On these grounds, the court rejected Albion's challenge to THPs 100 and 145. The court reasoned that "[n]one of the questions or comments on the letters are site specific" and that "the preprinted form letters submitted in opposition to the THPs were insufficient to meet the requirement that the exact issue upon which a suit is based be presented to the administrative body." The letters raised only issues that were applicable to THPs generally, and did not provide CDF with anything to consider when determining whether each particular THP should be approved. The court stated that "[i]t has long been settled that unsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt are not factors which must be considered when determining a project's potential effect on the environment." The court concluded that even if Albion were able to show that some of its members had participated in CDF's review of the THPs, thus bringing itself within the *Friends of Mammoth* exception, the challenge would fail because the issues upon which it sought judicial review were not properly presented at the administrative level.

With respect to THP 114, the court noted that a private individual had submitted some site specific objections. Thus, *Friends of Mammoth* might apply if other persons who participated at the administrative level by submitting comments in opposition to THP 114 subsequently became members of Albion. The court concluded that the matter must be remanded to the trial court to "determine whether Albion can bring itself within the *Friends of Mammoth* exception so as to assert in this litigation the site specific comments and objections submitted by Betty Ball in opposition to THP 114."

The court went on to reject Albion's contention that "even if it is found to have failed to exhaust its administrative remedies, it seeks to enforce rights which its members hold as part of the affected public; and that, therefore, it is entitled to proceed under the 'public interest' exception to the doctrine of administrative remedies" on the authority of *Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal. App. 3d 105 (1975). Under the so-called *Corte Madera* exception, the failure of a private person to exhaust administrative remedies does not bar him from seeking judicial relief by way of enforcing rights that he holds as a member of the affected public. However, courts have limited this exception to the exhaustion requirement to situations where the party seeking judicial relief from administrative action had no notice of the administrative proceedings, a condition not satisfied by Albion.

The court also held that no cause of action against DFG could lie because its role was strictly advisory and lacked the power to approve or deny a THP.

In ***Seattle Audubon Society v. Evans***, No. 91-35528 (Dec. 23, 1991), the U.S. Ninth Circuit Court of Appeals upheld a logging ban to protect the northern spotted owl, and directed the U.S. Forest Service (USFS) to prepare a forest management plan to preserve the owl. The debate centered upon whether classification as an endangered species relieved the Forest Service of its duty under the National Forest Management Act (NFMA) (16 U.S.C. sections 1600 *et seq.*) to plan for the future survival of the spotted owl. USFS appealed from an injunction entered by the district court in Seattle requiring USFS to put into effect revised standards and guidelines to ensure the viability of the northern spotted owl and enjoining, in the interim, timber sales located in spotted owl habitat in national forests of Washington, Oregon, and northern California. The district court held that such planning is required under NFMA.

In its appeal, USFS contended that it is no longer required under NFMA to plan for the future survival of the spotted owl because the U.S. Fish and Wildlife Service had declared it threatened under the federal Endangered Species Act (ESA). The Forest Service argued that "it is required to plan for viable species, and that a species declared threatened or endangered under the Endangered Species Act is no longer viable." The district court held that "the listing under the Endangered Species Act triggered new obligations under the Act but did not reduce the planning obligations of the Forest Service under the NFMA." In upholding the district court's opinion, Judge Mary Schroeder's caustic opinion emphasized that USFS had engaged in a "systematic refusal to follow the law in the past," and that this "is not an excuse for avoiding the current requirements of the NFMA and ESA in the future." Further, Schroeder emphasized that the Endangered Species Act list "is not a list of animals to be written off. It is a mandate for all agencies involved to take aggressive steps to avoid a species' extinction and preserve its viability." The Ninth Circuit's ruling leaves intact the district court's injunction until USFS prepares a new forest management plan. That plan is due by March 5.

On October 23, the First District Court of Appeal granted petitions for rehearing filed by the Board and Pacific Lumber Company in ***Sierra Club, et al. v. Board of Forestry (Pacific Lumber Company, Real Party in Interest)***, No. A047924 (Sept. 23, 1991). The court of appeal's decision upheld the authority of CDF to require THP submitters to prepare surveys of old-growth-dependent wildlife species in THPs relating to stands of old-growth forest with complex habitat characteristics. In so doing, the court reversed the Board of Forestry's approval of two 1988 THPs submitted by Pacific Lumber Company (PALCO); both THPs had been denied by CDF due to PALCO's failure to submit the requested wildlife surveys. (See CRLR Vol. 11, No. 4 (Fall 1991) pp. 191–92 for background information on this case.)

Redwood Coast Watersheds Alliance v. California State Board of Forestry, et al., No. 932123, is still pending in San Francisco County Superior Court. Through San Francisco environmental attorney Sharon Duggan, RCWA alleges that the Board and CDF are in violation of the FPA and the public trust doctrine by allowing "legalized depletion" of California's forestry resources. Specifically, RCWA alleges the Board has failed to establish adequate silvicultural standards; maintained inadequate stocking standards insufficient to fulfill maximum productivity; failed to adopt regulations ensuring the sustained production of high-quality timber products; approved THPs that deplete forest resources; failed to provide sufficient monitoring of and data for existing forest conditions; failed to protect watershed and wildlife values, fisheries, regional economic vitality, employment, and aesthetic enjoyment; failed to proceed according to law in that the Board and CDF have permitted—through lack of regulation and by using market forces as the guiding criteria for harvest levels—overharvesting, timber mining, declining utilization standards, lack of environmental protection for watersheds and species diversity, and the use of hardwoods for stocking without stocking standards for such species; and authorized timber harvesting regeneration methods that are not consistent with the biological requirements of the tree species, timber site, and soil.

On October 7, RCWA filed its second amended petition for writ of mandate and complaint for injunctive and declaratory relief. In the second amended petition, RCWA challenges the continued certification of CDF's THP process as the functional equivalent of an environmental impact report (EIR) under CEQA. RCWA alleges that "changes have occurred in the regulatory program since the initial certification by the Secretary of Resources in 1976 that require a withdrawal of the certification"; thus, RCWA seeks to set aside the June 1991 decision of the Resources Agency Secretary providing for continued certification. (See CRLR Vol. 11, No. 4 (Fall 1991) p. 193 and Vol. 11, No. 3 (Summer 1991) p. 176 for background information.)

Specifically, in the second amended petition, RCWA alleges that CDF's regulation of timber operations on private lands violates CEQA in several ways. First, it fails to mandate evaluation of all THPs by representative members of interdisciplinary review teams. Second, it fails to provide the orderly evaluation of proposed THPs consistent with the environmental protection purposes of the regulatory program, as evidenced by—among other things—the emphasis on market forces rather than environmental concerns. Third, changes to the FPA since certification in 1976 have eliminated certain standards which enabled evaluation consistent with environmental protection purposes, as required by CEQA, including consideration of the soil, timber site, and species present, improvement of the forest as a primary consideration, the protection of wildlife and prevention of erosion in the WLPZ, and identification of wildlife as an important and necessary component of the forest resources. Fourth, it fails to require consultation with agencies which have jurisdiction by law over resources. Fifth, since a description of alternatives to the proposed harvest and mitigation measures is not required in THPs, CEQA's requirement of such a description is violated. Sixth, amendments to the Forest Practice Act have resulted in CEQA violations by changing the required identification of the silvicultural method to presently requiring identification of the "regeneration" method; elimination of the requirement to state the provisions for protecting special treatment areas; elimination of the requirement to provide information about the methods of avoiding excessive acceleration of erosion in WLPZ; and the addition of rules to permit "consideration" of alternatives and mitigation without providing written description of the alternatives and mitigation measures. Seventh, CDF's THP process violates CEQA's provision for public review of the plan, because it permits inclusion of required written documentation after the close of the public comment period and review by other public agencies. Finally, changes in the FPA violate CEQA provisions which provide the public and other agencies with review of all required written documentation, insofar as close of public comment is now permitted before submission of required information from the plan submitter.

As a result of the amended allegations, RCWA seeks "a judicial determination and declaration that [the Board and CDF] are in violation of [CEQA] and that the certification of the regulation of timber harvest operations must be withdrawn due to changes in the Forest Practice Act, the rules and regulations of the Board of Forestry, [and] the contents of the timber harvesting plan which materially change the environmental protection and opportunities for public review provided at the time of the 1976 certification." Additionally, RCWA seeks "a judicial determination and declaration that [the Board and CDF] are in violation of [CEQA] in that they are carrying out the regulation of timber operations on private lands in a manner that is not consistent with or in compliance with the standards set forth in CEQA for functional equivalents."

FUTURE MEETINGS:
April 7–8 in Sacramento.
May 5–6 in Sacramento.

INDEPENDENTS

AUCTIONEER COMMISSION
Executive Officer: Karen Wyant
(916) 324-5894

The Auctioneer and Auction Licensing Act, Business and Professions Code section 5700 *et seq.*, was enacted in 1982 and establishes the California Auctioneer Commission to regulate auctioneers and auction businesses in California.

The Act is designed to protect the public from various forms of deceptive and fraudulent sales practices by establishing minimal requirements for the licensure of auctioneers and auction businesses and prohibiting certain types of conduct.

Section 5715 of the Act provides for the appointment of a seven-member Board of Governors, which is authorized to adopt and enforce regulations to carry out the provisions of the Act. The Board's regulations are codified in Division 35, Title 16 of the California Code of Regulations (CCR). The Board, which is composed of four public members and three auctioneers, is responsible for enforcing the provisions of the Act and administering the activities of the Commission. Members of the Board are appointed by the Governor for four-year terms. Each member must be at least 21 years old and a California resident for at least five years prior to appointment. In addition, the three indus-